Readyjet, Inc. *and* 32BJ SEIU New England 615.
Cases 01–CA–132326, 01–CA–140878, 01–CA–155263, 01–CA–159503, and 01–CA–159509

August 16, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On October 12, 2016, Administrative Law Judge Kenneth W. Chu issued the attached decision. The General Counsel filed a brief in partial support of the decision and a motion to correct omissions from the Decision and Order, and the Respondent filed a response to the motion to correct omissions. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

We agree with the judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discriminatorily issuing written warnings to employees Claudio Batista, Francisco Luna, Gerfi Mendez, Julio Medina, and Sergio Restituyo;[4] discriminatorily discharging Batista and Luna; telling Batista, Luna, Mendez, and Medina that their discipline was for their participation in the strike and threatening them with further discipline for their activity in support of the Union; and, through Supervisor Luis Oliva, unlawfully interrogating employees.[5]

The judge also found that the Respondent violated Section 8(a)(1), through Supervisor Rafael Felipe, by unlawfully interrogating employees Evelyn Gonzalez and Egla Cruz, threatening Gonzalez and Cruz with loss of employment, and creating the impression that employees' union activities were under surveillance. It is undisputed that these allegations arose from incidents that occurred on January 7, 2014. The Respondent excepts to the judge's findings, arguing that, because the relevant charge was filed more than 6 months later on July 8, 2014, these allegations are time barred under Section

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The General Counsel has cross-excepted to the judge's failure to order that the Respondent cease and desist from telling employees that their discipline was for their participation in the strike and threatening further discipline for supporting the Union. The General Counsel also has excepted to the judge's omission of order language requiring a public notice reading, which the judge found to be appropriate in his decision. We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language, and to correct these inadvertent omissions. We shall also substitute a new notice to conform to the Order as modified.

[4] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by issuing warnings to employees for engaging in a 1-day strike without complying with its "no call/no show" policy that requires advance notice of absences from work, we do not rely on his analysis under *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21 (1964). Under *Burnup & Sims*, an employer violates Sec. 8(a)(1) by disciplining an employee based on a good-faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. However, the *Burnup & Sims* analysis "applies in cases involving mistakes of fact, not mistakes of law." *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 6 fn. 20 (2014). Here, the Respondent admits that it disciplined the employees solely because they struck without providing advance notice, and argues that it lawfully did so. That presents an issue of law, about which the Respondent is incorrect, as employees lawfully may strike without prior notice, notwithstanding an employer's policy that requires advance notice of employee absences. *Iowa Packing Co*., 338 NLRB 1140, 1144 (2003). Accordingly, because the Respondent concedes that it disciplined employees for conduct that was protected, its motive for the discipline is undisputed and no further analysis is required. *CGLM, Inc*., 350 NLRB 974, 974 fn. 2 (2007); *HMY Roomstore, Inc*., 344 NLRB 963, 966 (2005). As this is a single-motive case, we also reject the Respondent's contention that the judge erroneously failed to apply the dual-motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] The General Counsel has not excepted to the judge's finding that the Respondent did not violate the Act, through Supervisor Geraldo Almonte, by interrogating an employee about his union activities.

Chairman Miscimarra disagrees with two of the remedies that his colleagues order: (1) ordering the Respondent to compensate Batista and Luna for any search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings; and (2) ordering that the notice be read aloud to employees. First, for the reasons stated in his separate opinion in *King Soopers, Inc.*, 364 NLRB No. 93, slip op. at 9–16 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Chairman Miscimarra would adhere to the Board's former approach of treating search-for-work and interim employment expenses as an offset against interim earnings. Second, notice reading is an extraordinary remedy reserved for "unfair labor practices [that] are sufficiently serious and *widespread*," *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008) (emphasis added), and Chairman Miscimarra would not find that the isolated early 2014 interrogation of two employees and the 2015 strike-related discipline and threats to at most five employees constituted *widespread* violations in a bargaining unit of about 240 employees.

10(b) of the Act. We agree.[6] Accordingly, we dismiss these allegations.

AMENDED CONCLUSIONS OF LAW

1. Delete paragraphs 7 and 8 of the judge's Conclusions of Law and renumber the remaining conclusions accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, ReadyJet, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees because of their support for 32BJ SEIU New England 615 or any other union.

(b) Coercively interrogating employees about their union sympathies.

(c) Threatening employees with discipline or discharge if they engage in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Claudio Batista and Francisco Luna full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Batista and Luna whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Batista and Luna for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Batista and Luna and within 3 days thereafter notify the employees in writing in English and Spanish that this has been done and that the discharges will not be used against them in any way.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines of Batista, Luna, Gerfi Mendez, Julio Medina, and Sergio Restituyo and within 3 days thereafter notify the employees in writing in English and Spanish that this has been done and that the disciplines will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Boston, Massachusetts facility copies of the attached notice marked "Appendix"[7] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2014.

(h) Within 14 days after service by the Region, hold a meeting or meetings at Terminal A and Terminal C at Logan International Airport, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the Respondent's representative in the presence of a Board agent and an agent of the Union if the Union so desires, or, at the Respondent's option, by a Board agent in the presence of supervisors, to include Sarah Colon, Luis Oliva, Giovannie Martinez, Jensy Diaz, and Jean Carlos Torres, and an agent of the

[6] Although the Respondent timely raised its 10(b) defense in its answer to the complaint, the judge failed to address this argument in his decision. The General Counsel did not respond to the Respondent's 10(b) argument on exceptions.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union if the Union so desires. In either case, the Respondent shall make translation available for Spanish-speaking employees.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 16, 2017

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Philip A. Miscimarra, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline, or otherwise discriminate against you because of your support for 32BJ SEIU New England 615 or any other union.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT threaten you with discipline or discharge if you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Claudio Batista and Francisco Luna full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Claudio Batista and Francisco Luna whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Claudio Batista and Francisco Luna for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharges of Claudio Batista and Francisco Luna, and WE WILL, within 3 days thereafter, notify them in writing in English and Spanish that we have done so and that we will not use the discharges against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful disciplines of Claudio Batista, Francisco Luna, Gerfi Mendez, Julio Medina, and Sergio Restituyo, and WE WILL, within 3 days thereafter, notify them in writing in English and Spanish that we have done so and that we will not use the disciplines against them in any way.

READYJET INC

The Board's decision can be found at www.nlrb.gov/case/01–CA–132326 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Boston, Massachusetts, on July 27 and 28, 2016. The initial charge was filed July 8, 2014,[1] with additional charges subsequently filed. A consolidated complaint was issued by Region 1 of the National Labor Relations Board (NLRB) on January 28, 2016 (GC Exh. 1aa).[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a corporation with an office and place of business located at the General Edward Lawrence Logan International Airport (Logan), has been engaged in providing commercial cleaning services within the Commonwealth of Massachusetts, where it annually provides services valued in excess of $50,000 at the Logan airport to airline carriers, which directly engages in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The 32BJ SEIU New England 615 (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint paragraphs allege that ReadyJet, Inc. (Respondent or ReadyJet) violated Section 8(a)(1) of the National Labor Relations Act (Act) when

> 8. In about January or February 2014, Respondent, by Rafael Felipe, at the Logan Airport facility:
> (a) interrogated employees about their union sympathies and union activities;
> (b) threatened employees with loss of employment if they engaged in union activities; and
> (c) created the impression that employees' union activities were being watched by Respondent.
>
> 9. In about February or March 2014, Respondent, by Luis Oliva, at the Logan Airport facility, interrogated employees about their union activities.
>
> 10. On various occasions between January and July 2014, Respondent, by Geraldo Almonte, in his car in the metropolitan Boston area, interrogated employees about the union activities of other employees.
>
> 11. About June 16, 2015, certain employees of Respondent employed at the Logan Airport facility ceased work concertedly and engaged in a strike.
>
> 12. About June 18, 2015, Respondent, by Giovannie Martinez, at the Boston Logan facility:
>
> (a) told employees that they were issued warnings for participating in the strike described above in paragraph 11; and
> (b) threatened employees with more severe discipline, up to suspension and loss of employment, if they continued to participate in union activities.
>
> The complaint further alleges in the following paragraphs that the Respondent violated Section 8(a)(1) of the Act when
>
> 13. About June 18, 2015, Respondent issued written disciplinary warnings to its employees named below:
>
> Claudio Batista
> Francisco Luna
> Julio Medina
> Gerfi Mendez
> Sergio Restituyo
>
> 14. About July 27, 2015, Respondent terminated Francisco Luna.
>
> 15. About August 5, 2015, Respondent terminated Claudio Batista.
>
> 16. Respondent engaged in the conduct described above in paragraphs 13, 14, and 15 because the named employees engaged in the strike described above in paragraph 11, and because the employees formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The complaint states that the conducted described in paragraphs 8, 9, 10, 12, 13, 14, and 15, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.[3]

The Respondent timely filed an answer to the complaint denying the material allegations in the complaint (GC Exh. 1cc, 1hh).

III. CREDIBILITY DETERMINATIONS

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

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[1] All dates are in 2015 unless otherwise indicated.

[2] The exhibits for the General Counsel are identified as "GC Exh." The exhibits for the Respondent are identified as "R. Exh." Joint exhibits have been identified as "Jt. Exh." The hearing transcript is referenced as "Tr." and closing briefs are identified as "GC Br." for the General Counsel and "R. Br." for the Respondent.

[3] The complaint was amended during the hearing (GC Exh. 4).

1. Background

The Respondent provides cleaning service to Delta Airlines in Terminal A and to JetBlue in Terminal C at Boston Logan Airport. The Union has been engaged in organizing efforts with the employees of ReadyJet since 2013. At the time of the hearing, the Union has not been certified by the NLRB as the exclusive collective-bargaining representative of the Respondent's employees.

Andry Mendez (Mendez) testified that he is and has been a union supervisor lead for 9 years and involved in organizing the workers at Logan Airport since 2011. Mendez said that the Union had organized the workers of Respondent's predecessors, Aramark, which had a cleaning service contract at Logan airport. The Union and Aramark negotiated a collective-bargaining agreement, but after the Company lost the cleaning contract, many of the employees were laid off. Mendez said that eventually, ReadyJet was awarded a cleaning service contract at the airport and a few of the Aramark employees were rehired by the Respondent (Tr. 15–19).

Mendez testified that Lydia Kamanou, Delfina Ramos, Rose Levy, and Yusuf Farah were a few of the union organizers involved in organizing the workers at ReadyJet. Mendez supervises Kamanou and she had reported to him about intimidation from ReadyJet management against the employees that included talks against the Union and threats made to employees. Mendez said he spoke to management about this intimidation, specifically with Sarah Colon and Rafael Felipe, as well as several other managers and supervisors (Tr. 20–25). The genesis of the charges in the complaint is the alleged threats and intimidation made to the employees by the Respondent related to the Union's organizing efforts and the discipline issued to the employees after an unfair labor practice strike.

2. The unfair labor practice strike

Daniel Nicolai (Nicolai) testified that he is employed by the Union as a district leader and was in charge of the logistics for a strike that the Union had organized against the Respondent on June 16.[4] Nicolai said that the June strike was for the unfair labor practices of the Respondent. Nicolai testified that the strike was planned 2 weeks in advance. The union policy was to contact the Company if there is a planned strike.

Nicolai testified that he prepared, signed, and delivered the strike notice to the Respondent by email to the CEO Richard Castellano with a scanned attachment of the strike notice. He said that the email was sent on June 16 at 10:12 p.m. (GC Exh. 5). Nicolai said he directed someone from the union office to also send the strike notice via fax to the Respondent. Nicolai believed the fax was sent out the same time as the email (Tr. 156–159, 174, 181). The strike notice (GC Exh. 6) stated

> This is to notify you that ReadyJet cabin cleaners at Logan International Airport and other employees who may sympathize are going on a one-day strike to start with the employees' regularly-scheduled shifts commencing this evening, Tuesday, June 16, 2015.
>
> The employees will strike to protest the company's lack of respect for their rights to form a union free of intimidation and coercion. After the one-day strike, employees will return to work on their next regularly-scheduled shifts beginning on Wednesday, June 17th.
>
> ReadyJet workers do not take this action lightly. Both our union and the workers take the services they provide very seriously and view this strike as a matter of last resort. The workers have decided to strike because they can no longer tolerate this kind of treatment, and they see no other alternative.
>
> We ask that you respect the ReadyJet employees' legally-protected rights to engage in collective action to improve their working conditions.

Nicolai testified that he never received a response to the fax or email so he sent another fax to the Respondent at approximately 2 a.m. on June 17 to Dominic Patti, a management person with Respondent with copies to other union personnel (GC Exh. 7). Nicolai believed that the earlier email was received by Respondent and "don't know why I waited" to send the second fax after the strike was over (Tr.159–161, 175–177).

Mendez testified that the strike occurred at Logan airport Terminal A, lower level. He said that the front and entrance way through Terminal A is a glass wall and door. The entrance by employees to the ReadyJet premises was through a security doorway next to a Dunkin' Donuts coffee shop that is approximately 30 feet from the entrance of the glass exterior wall of Terminal A (Tr. 25, 26).

Mendez said that the strike started around 9-9:15 p.m. on the exterior side of the glass wall and entrance to Terminal A. Mendez said there was also a union-organized strike occurring at the same time at Logan Airport Terminal C. Mendez testified that there were approximately 10 workers walking around in a circle and sang and shouted slogans ("stuff of the strike"). He said that the rest of the strikers mingled in a side corner of the terminal entrance. Mendez believed that the strike ended around 11 p.m. and he went upstairs to the union office that was located on another level in Terminal A (Tr. 26–28, 31, 33).

Nicolai testified that the strike at Terminal A with the ReadyJet workers started at 10:30 p.m. on June 16 and ended at 12:30 a.m. on June 17. He confirmed that there was a second strike at Terminal C, but that strike did not start until 3 a.m. and was with a different service cleaning company. (Tr. 168, 169, 172).

Mendez said the night employees involved in the strike included Gerfi Mendez, Julio Medina, Claudio Batista, Victor Mendez, Cosme De La Cruz, Sergio Restituyo, and Francisco Luno. Mendez said one of Respondent's supervisors, Jean Carlos Torres, was present around 8:30 p.m. near the security door entrance to the Respondent's premises just before the strike started. Mendez said he was literally one step from Torres. He noticed Torres make a phone call to someone by the name of "Giovannie," who has been identified as Giovannie Martinez, the ReadyJet overnight manager. Mendez testified that he heard Torres speak into a cell phone saying, "I told you that the strike was today. Andry is here and a few people of the Union." Mendez testified that Torres was present for "maybe

[4] Nicolai testified that the strike and picket occurred on June 14, but it was in fact held on June 16.

one minute" before entering through the security door. Mendez knew Torres was talking to Martinez because he named the recipient of the call by name (Tr. 24, 28, 29, 31, 32, and 34).

Mendez testified that he subsequently observed Martinez at Terminal A around 9:15-9:20 p.m. in front of the Dunkin' Donuts. Mendez was certain that Martinez was in front of the Dunkin' Donuts observing the striking employees. Mendez averred that he did not observe any other supervisor at that time (Tr. 29, 30). Mendez believed that Martinez stood observing the strikers for approximately 15–20 minutes (Tr. 32).

Nicolai testified that there was a large group of workers standing nearby and that he actively participated in the strike. Nicolai did not recall observing any supervisors standing around Terminal A during the strike (Tr. 166, 167).

Mendez and Nicolai returned the following night (June 17) around 8-8:30 p.m. to Terminal A. He waited around for the strikers from the previous night to arrive for work. Mendez testified that he wanted to make sure that the striking employees came to work but was also concerned that Respondent would not permit them to work (Tr. 37–39).

Mendez noticed a group of workers arriving around 9:10 p.m. when one of the Respondent's supervisors appeared. Mendez identified the supervisor as Jensy Diaz (Diaz) and he was given a packet of documents by the Union. Mendez believed that Diaz came outside to the Terminal A area from the ReadyJet security door to meet some workers who had not been issued their security clearance in order to escort them through security (Tr. 37).

Nicolai testified that he spoke to Diaz around 10:30 p.m. at Terminal A on June 17. He gave Diaz a packet of information and said he hoped that management will respect people's right and allow people to return to work. Nicolai said Diaz responded if Nicolai knew what "no call/no show" meant. Nicolai replied that this was not a "no call/no show" situation but rather, a protected unfair labor practice strike (Tr. 162–164, 177). Mendez also recalled Diaz stating that the workers who were "no-calls" and "no-shows" were going to receive discipline (Tr. 30, 31). Nicolai testified that the workers were not given instructions by the Union as to whether to call in or not (Tr. 164). Nicolai said that there has been no contact between the Respondent and Union since the time of the strike (Tr. 171).

3. The Discipline and Discharge of readyjet Workers

Claudio Batista

Claudio Batista (Batista) was employed by ReadyJet from 2013 until August 5, 2015 when he was discharged. Batista was supervised by Martinez and Torres. Batista was scheduled to work at Logan airport Terminal A from 9:45 p.m. to 8 a.m. on the night of the strike (Tr. 76, 77, 91).

Batista recalled participating in the strike by walking in a circle while picketing at Terminal A. Batista picked up a sign and began to picket. He described the picket signs as saying "Strike" and "Stop the exploitation." He said the signs were in English. Batista also remembered employees Julio Medina, Gerfi Mendez, Sergio Restituyo, and Francisco Luna were on strike with him (Tr. 77–79).

Batista knew he was not going to work because he was involved in the strike (Tr. 92). Batista said he was on the outside of the exterior glass wall of Terminal A when he observed Supervisor Torres through the glass wall, who was standing by the security door to the ReadyJet premises. Batista described that Torres was behind the revolving luggage carousel (Tr. 93).

Batista testified that Torres was standing by the security door for approximately 20–25 minutes. Batista did not notice that union organizer Mendez was standing next to Torres. Batista did not know if Torres went through the security door afterwards. Batista was unsure how far away Torres was from him (Tr. 79–82, 89, 93).

Batista testified that Torres had called him by phone about 9:45 p.m. while he was on the picket line. According to Batista, he was asked by Torres if Batista was coming to work this night. Batista responded no because he was on strike. Batista went to Terminal C to continue the strike after the strike concluded at Terminal A (Tr. 90).

Batista met Torres the next day around 9:45 p.m. According to Batista, Torres inquired as to "When you gonna tell me?" (referring to the no call/no show policy) and was instructed by Torres to see Martinez. Batista went to see Martinez in his office and received a final written warning from Martinez. Torres was also present when Batista received the notice. The final written warning (Jt. Exh. 1) dated June 18, in part, stated

> The purpose of this letter is to emphasize the seriousness of calling in advance to inform ReadyJet, Inc. of your absence. This letter is being issued as a Final Written Warning for failure to comply on Tuesday, June 16, 2015.

Martinez warned Batista that this was his last chance because of involvement with the union strike. Batista refused to sign the warning because he was not in agreement that he should receive a warning for going out on strike (Tr. 82–85).

Batista conceded that he was familiar with company policy about calling in when absent or not showing up for work. He admitted not calling in on the night of the strike. (Tr. 92.)

Batista was subsequently discharged by ReadyJet on August 5. Martinez informed Batista of his discharge and was told that he was no longer working for the Company. According to Batista, Martinez said the discharge was because of Batista "having been absent without call-in and for being involved in matters with the Union" (Tr. 86, 87.) The employee termination notice did not state the reason for his discharge (Jt. Exh. 6).

Batista repined that he never missed a call-in or absent without leave and never had any attendance infractions since the time of the strike until his termination (Tr. 87, 88). Batista conceded he had been absent from work in the past for attending school on Mondays but maintained that he had not been absent from work while attending school since the time of the strike (Tr. 96).

Gerfi Mendez

Gerfi Mendez (Mendez) worked as a cleaner at Logan airport Terminal A for ReadyJet from February 2014 and resigned in July 2016. Mendez' work shift was from 10 p.m. to either 6 or 7 a.m. Mendez was supervised by Torres and Martinez. Mendez said he was contacted by Andry Mendez about the strike and whether he would join the strike (Tr. 105). Mendez testified that he participated in the strike at Terminal A and did not

report to work nor gave notice that he was not coming to work on the night of the strike. Mendez testified that he joined his colleagues at the picket line and participated for an hour. Mendez recalled that Luna, Batista, Medina, and Restituyo were walking the picket in a circle during the strike (Tr. 98–100). Like Batista, Mendez went to Terminal C afterwards to continue the strike (Tr. 103).

Mendez testified that he received a written warning from supervisor Martinez, dated June 18 (Jt. Exh. 4). The warning notice, in part, stated

> The purpose of this letter is to emphasize the seriousness of calling in advance to inform ReadyJet, Inc. of your absence. This letter is being issued as a Final Written Warning for failure to comply on Tuesday, June 16, 2015.

According to Mendez, Martinez asked why Mendez did not go to work on the night of the strike and was told if he did not show up for work again, he could lose his job (Tr. 100–102). Mendez admitted to having received prior warnings for attendance infractions before and after the date of the strike (Tr. 05).

Julio Medina

Julio Medina (Medina) was employed by ReadyJet in 2015 and voluntarily resigned in mid-February 2016. He was a cleaner and worked from 10 p.m. to the morning. Medina also participated in the June 16 strike. He did not report to work nor give notice that he was not reporting to work (Tr.109, 110).

Medina received a written warning notice from Martinez and was allegedly told by Martinez that he got the warning "because I have gone on strike" (Tr. 111, 112; Jt. Exh. 3). The warning stated

> The purpose of this letter is to emphasize the seriousness of calling in advance to inform ReadyJet, Inc. of your absence. This letter is being issued as a Written Warning for failure to comply on Tuesday, June 16, 2015.
>
> Continued lack of communication could result in further disciplinary action, up to and including Termination of Employment.

Medina maintained that Martinez told him that if he continued to support the Union, he would receive more warnings or be discharged. Medina testified that nothing else was said at the meeting (Tr. 112–114).

Medina conceded that he was aware of the company's policy to call in when he was a no show or absent from work. Mendez said no one told him not to call in and he did not have any discussions with the Union or anyone else before the strike (Tr. 115).

Francisco Luna

Francisco Luna (Luna) worked for ReadyJet as a cleaner from September 2014 until June 2015 when he was terminated. Luna was responsible for removing trash from Terminal A and for replenishing the water in the planes' lavatories. At the time, Luna was supervised by Martinez, Torres, and Diaz (Tr. 118, 119, 127).

Luna also participated in the June 16 strike that occurred during his work shift. He did not call to say that he was not coming to work. Luna testified that he observed other workers on strike as he arrived at Terminal A at 10 p.m. and decided to join the strike.

Luna testified that he received a warning for no call/no show by Martinez on June 18. Luna was told by Martinez that he did not call in when he failed to show up for work. Martinez told him that this was his final warning. Luna said nothing in response. (Tr. 121, 122, 131, 132). The written final warning (Jt. Exh. 2) stated:

> The purpose of this letter is to emphasize the seriousness of calling in advance to inform ReadyJet, Inc. of your absence. This letter is being issued as a Final Written Warning for failure to comply on Tuesday, June 16, 2015.
>
> Continued lack of communication could result in further disciplinary action, up to and including Termination of Employment.

Luna was subsequently discharged on July 27 (Jt. Exh. 7). Sarah Colon (Colon) gave Luna his termination notice. The termination notice stated:

> Employee is being terminated because of his failure to follow company policies and job duties as Expected and trained. Employee has received 4 discipline notices in accordance with the company's Progressive discipline policy. Warnings consist of three instances whereby the employee did not fulfill his job duties as required by the company and the customer, one of which cost the company a fine of $90 by the airport. Another of the warnings caused a safety hazard to all employees. Additionally, The employee did not follow company policy by not calling management to inform them he would not be at work. The latest incident caused the company to receive a delay by the airport for failing to perform services that were assigned to him. The employee falsified work time sheets which is also against company policy where (Falsification of Company Records).

Luna testified that he could not understand nor was he able to read the termination notice because of his limited English. Luna maintains that Colon did not translate the information in the termination notice for him. Luna thought that he was signing a renewal application for his security credentials and not his termination notice. Luna said he was never informed of the reason for his termination until after he signed the form. Luna said that Colon told him it was a termination notice and that Andry (Mendez) would be able to find him a new job (Tr. 123–128).

Luna maintained that he found out "a few days later" the reason for his termination when a friend translated the termination notice, but admitted that it was explained to him at the meeting with Colon and Martinez that he was terminated because he did not replenish the water tank in the plane's lavatory. He replied to Colon that it was "not his job" (Tr. 136–139).

On cross-examination, Luna admitted that he did not ask Martinez or Colon to translate the termination notice even though he knew that they were both bilingual in Spanish and English (Tr. 135). Luna also admitted that he was previously given a written warning on March 17 for failing to pick up

trash, which he signed and was aware of what he was signing (Tr. 136; R. Exh. 2).[5]

Respondent's Rebuttal to the Discipline and Discharges

It has been stipulated that Giovannie Martinez (Martinez) is the overnight manager for ReadyJet and is a supervisor within the meaning of Section 2(11) of the Act (Jt. Exh. 8). Martinez was a supervisor with ReadyJet and was on the 11 p.m. to 7:30 a.m. work shift during the June 16 strike at Terminal A (Tr. 191, 192).

Martinez was aware of the June 16 strike, but does not recall whether he was working on that day but believed he was (Tr. 192). At the time, Martinez supervised Gerfi Mendez, Claudio Batista, and Francisco Luna. Martinez believed that the three employees were aware of the Respondent's no call/no show policy and recalled giving them warnings about their no call/no show for June 16 (Tr. 193, 194). Martinez testified that he met with each individual and gave them warnings for their no call/no show for June 16. He said that either Supervisor Diaz or Torres was present with him when the warnings were issued. He did not recall if any individual responded to the warning, but believed they said nothing (Tr. 194, 195).

With regard to Batista's termination, Martinez said that Batista was terminated because he arrived late every Monday and then he had a no call/no show, "so we terminated him." Martinez testified that Batista told him that he was late on Mondays because of his scheduling conflict with school. Martinez said he promised to work with Batista in arranging his work and school schedules but that would require Batista to work on Saturdays and Sundays and Batista refused the offer. According to Martinez, Batista told him that he will keep his current schedule and do the best he could to arrive on time on Mondays. Martinez could not recall how many times that Batista had been late for work on Mondays (Tr. 196, 197).

With regard to Luna, Martinez testified that he was terminated for falsification of records. According to Martinez, Luna was responsible to ensuring there is sufficient water in the planes' lavatories and a pilot had called that this service was not done. Martinez had a meeting with Luna in the office of Sarah Colon. Martinez believed that Colon explained to Luna the reason for his termination. He did not recall if Luna responded. His termination notice was written in English but insisted that the explanation for his termination was verbally given in Spanish by Colon (Tr. 197–199). Martinez said that Luna had also received a warning for his no call/no show on the strike date, but did not recall if Luna had any attendance warnings prior to the strike date (Tr. 200).

Jean Carlos Torres Pietris (Torres) testified that he is one of the overnight supervisors and is responsible for ensuring that the lavatories of the planes are clean and properly maintained with water. Torres became a supervisor in 2014 at Terminal A and supervises all employees on the overnight shift from 10 p.m. to the morning until the work is finished, usually around 6:30-7 a.m. (Tr. 204–206).

Torres described that employees would routinely arrive at work and go through a security door to the ReadyJet premises. He said that the employee would show a badge; enter their fingerprint; and then a PIN number at the security door. Torres testified he never had a reason to stand by the security door and was not familiar with the June strike (Tr. 206–208).

Torres said he was a management witness for Batista's termination. He testified that Martinez terminated Batista after management had changed his work schedule to accommodate his attendance at school on Mondays, but Batista continued to be a no call/no show on the 5th day of his work schedule. Torres believed that Batista understood that he was wrong for not calling in (Tr. 208, 209).

Jensy Alexander Diaz (Diaz) is a supervisor and started working for Respondent on March 5, 2014. Diaz was a group lead before becoming a supervisor. He was a group lead in June 2015. As a group lead, Diaz was responsible for guiding the workers with their work assignments (Tr. 212).

Diaz works the 10 p.m. until 6 or 7 a.m. shift. Diaz does not recall working on the night of the strike, but was nevertheless aware there was a strike. Diaz worked the following day/night on June 17. Diaz knows union organizer Mendez, but denied having a conversation with him in regard to the strike on the night of June 17 and only spoke to him once regarding a non-strike matter (Tr. 213, 214).

Diaz was involved as a management witness in the discipline meeting of Medina regarding his no call/no show. He denied that the warning was in regard to the strike. Diaz did not recall the date of the discipline or much more from the meeting (Tr. 215, 216).

As stipulated, Sarah Colon (Colon) is the general manager at ReadyJet (Jt. Exh. 8) and has been for the past 2 years. She has been employed by ReadyJet for over 5 years. She started as a cleaner in 2011 and progressed to general manager in 2014. Colon oversees operations at Logan airport Terminals A and C and deals with staffing, scheduling, and disciplinary issues. She said there are 240 employees in various cleaning positions and in "lav and water" with responsibility for cleaning the lavatories of the planes and for removing waste and replenishing the water (Tr. 229–231).

Colon testified that ReadyJet's no call/no show policy means that an employee is required to call in advance if he or she plans not to show up for work. She stated that if the employee does not call in, he or she will be disciplined (Tr. 245). Colon also stated that a final warning is defined as a performance infraction and another subsequent infraction can lead to termination or will lead to termination (Tr. 254). Colon testified that the no call/no show policy is reflected in the Respondent's attendance policy (Tr. 248, 249; R. Exh. 5) and states in relevant part:

> Employees who fail to contact their Station or General Manager cause others to take on additional duties which lead to an overall loss in productivity. An employee, who fails to notify his/her department of any absence in accordance with the department's policy, will be subject to corrective action as follows—

[5] The General Counsel maintains that Sergio Restituyo was also given a written warning for no show/no call on June 16, the night of the strike (Jt. Exh. 5). Restituyo did not testify at the hearing and no testimony was proffered as to the circumstances of Restituyo's participation in the strike or the warning notice that he received on June 18.

1st failure to notify of absence - verbal warning
2nd failure to notify of absence - written warning
3rd failure to notify of absence - termination

With regard to Batista's discharge, Colon testified he was terminated due to attendance infractions. Colon said that Batista had asked to change his schedule because he needed Mondays as a nonwork day to attend school. He was given a new work schedule but he was required to report to work on Saturday and Sunday, which he would not accept (Tr. 231). Colon described that ReadyJet has timesheet records when the employees punch in and out (R. Exh. 3). She testified that on July 6, 2015, Batista called out (Monday); on July 13, Batista also called out (Monday); on July 20, he called out (Monday); and on August 3 (Monday), Batista was a no call/no show. Colon said that it was noted in Spanish on the timesheet report that Batista's absences were "Excuse Not Valid" (Tr. 232–235).

With regard to Luna, Colon said he was terminated due to performance issues. Colon complained that ReadyJet received a fine by Massport for not collecting trash, which was Luna's responsibility and that he also failed to empty the waste and replenish the water on a Delta plane's lavatory. Colon testified the plane's departure was delayed because the lavatory had to be reserviced with water and Luna was subsequently terminated because of the latest incident dealing with the plane's lavatory (Tr. 236–240).

Colon testified that the termination notice was written in English and explained to him in English by Colon. Colon said that Luna understood English. Colon said that Luna insisted that he had serviced the plane. However, Colon testified that Luna was discharged based upon previous infractions and the nonservice of the Delta plane the night before. Colon said Luna did not ask any questions and he knew he was terminated because he had to turn in his security credentials, including his badge (Tr. 240–242; 250, 251).

Colon said that other employees not involved with the June 16 strike have also been disciplined for no call/no show. Colon indicated that on March 16, 2015, Eliezer Jiminian was disciplined for failure to show up for scheduled start time after a prior discussion regarding his start time. She also stated that Maria Garcia was disciplined on June 14 for no call/no show, which was 2 days before the strike. Colon described that employee Hector Gomez was written up on July 4 for being a no call/no show, as well as other employees, Yilma and Ortiz (Tr. 246–248; R. Exh. 4).

Discussion and Analysis

The counsel for the General Counsel argues that Respondent violated Section 8(a)(1) of the Act by (a) on about June 18, 2015 telling employees they were issued warnings for participating in a strike and by threatening employees with more severe discipline, up to suspension and loss of employment, if they continued to participate in union activities; (b) issuing written disciplinary warnings to employees Claudio Batista, Francisco Luna, Julio Medina, Gerti Mendez, and Sergio Restituyo; and (c) terminating employee Francisco Luna on about July 27, 2015; and terminating employee Claudio Batista on about August 5, 2015 (GC Br. at 3, 4).

Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging and disciplining employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1). Section 7 of the Act guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." See, *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009). In *Myers Industries (Myers I),* 268 NLRB 493 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."

Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. Id., slip op. at 3, 5–6.

a. The Respondent violated Section 8(a)(1) of the Act by issuing disciplinary warnings to employees who were on strike

The counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) of the Act when written warnings were issued to Batista, Medina, Luna, Restituyo, and Mendez for "failure to comply on Tuesday, June 16, 2015" (Jt. Exh. 5). The alleged failure to comply was the failure of the employees to call-in and inform ReadyJet supervisors that they would not be showing up for work on June 16 (the night of the strike) under the Company's "no call-no show" policy.

When an employer discharges an employee ostensibly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration—the protected activity of the employee or other employees—entered into the decision making process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the mixed motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

However, the Board has held that where the conduct for which the employee is disciplined is intertwined with protected concerted activity, the Board's traditional *Wright Line* analysis does not apply. *Rogers Corp.,* 344 NLRB 504, 513 (2005), citing *Felix Industries*, 331 NLRB 144, 146 (2000). Rather, the Board applies the test set forth by the Supreme Court in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964); *Amelio's*, 301 NLRB 182 (1991). The Court held in *Burnup* that

> In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protect-

> ed activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

As with all alleged 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances." *TheRoomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

It has not been seriously disputed that Martinez the overnight manager, was aware that the disciplined employees were engaged in a protected activity. Union Organizer Mendez overheard Torres talking to Martinez on the phone on the night of the strike. Martinez testified that he was aware of the strike and the employees involved in the strike. It is also not seriously disputed that Martinez, on June 18, issued the written warnings to the five workers because they failed to call in when they did not work their scheduled shifts but instead, participated in the strike.[6] The Respondent issued final warnings to Batista, Mendez and Luna. Medina and Restituyo were given warnings (Jt. Exhs. 1–5).

Martinez testified that he was aware that the strike had occurred on June 16, although he could not recall if he was working that night. Martinez also testified (Tr. 192–194):

> Q. Do you recall giving warnings to certain employees for no call/no show on or about June 16, 2015?
>
> A. I have given out warnings for no call/no show, but I don't remember exactly the dates.
>
> Q. Do you recall giving warnings for no call/no show for the picketing activity of June 16, 2015?
>
> A. Yes, I issue warnings.

It is clear that the June 16 strike and picketing was a concerted activity afforded protection under Section 7 of the Act. The courts have likewise repeatedly recognized and effectuated the strong interest of Federal labor policy in the legitimate use of the strike. *Automobile Workers v. O'Brien,* 339 U.S. 454; *Amalgamated Assn. of Electric Railway. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951) ; *Labor Board v. Remington Rand, Inc.*, 130 F.2d 919 (1942); *Cusano v. NLRB*, 190 F.2d 898 (1951); cf. *Sinclair Ref. Co. v. Atkinson*, 370 U. S. 195 (1962); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). Picketing, of course is also a concerted activity. Picketing "generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." *NLRB v. Retail Store Union Local 1001*, 447 U.S. 607, 618–619 (1980) (picketing "involves patrol of a particular locality") (quoting *Bakery Drivers v. Wohl*, 315 U.S. 769, 776–777 (1942); *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199, 1213 (9th Cir. 2005) ("Classically, picketers walk in a line and, in so doing, create a symbolic barrier").

I find that Martinez' testimony (above), without dispute, shows that the warnings were issued because the five employees failed to call in when they were picketing on June 16. The alleged misconduct was not following ReadyJet's policy to call when not reporting to work. However, the conduct for which the employees were disciplined is itself protected, concerted activity and unlawful under the Act. *Burnup*, above. Additionally, the Board has held that the Act protects the "right to strike without prior notice" despite an employer's policy that requires advance notice by a worker when not coming to work. *Iowa Packing Co*., 338 NLRB 1140, 1144 (2003); also, *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963) (the Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice).

Accordingly I find that the written warnings clearly had the tendency to restrain and coerce employees in the exercise of their Section 7 rights. *Electrical South, Inc*., 327 NLRB 270, 277 (1998).

b. The Respondent violated Section 8(a)(1) of the Act by telling employees that they were disciplined for their participation in *the strike and threatened with discipline for further union involvement*

The counsel for the General Counsel further argues that threats made by Martinez of future discipline in support of the Union is also a violation of Section 8(a)(1) of the Act. I agree.

I credit the testimony of Batista, Mendez, Medina, and Luna when Martinez threatened them with more severe discipline because of their participation in union activity. Martinez warned Batista that this was his last chance because of involvement with the Union strike (Tr. 82–85). Martinez asked Mendez why he did not go to work on the night of the strike and told Mendez he could lose his job if he did not show up for work again (Tr. 100–102). Martinez told Medina that he would receive more warnings or a discharge if he continued to support the Union (Tr. 112–114). Martinez told Luna that he did not call in when he failed to show up for work on June 16. Martinez told him that this was his final warning (Tr. 121).

It is well settled that coercive and threatening statements are measured not by the subjective views of either the speaker or the listener, but by whether the remarks had the reasonable tendency to interfere with the free exercise of Section 7 rights. See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946). In these circumstances, Martinez' remarks were clearly coercive, and Respondent thus violated Section 8(a)(1) of the Act. See *Ellison Media Co.*, 344 NLRB 1112, 1113 (2005); *George L. Mee Memorial Hospital*, 348 NLRB 327 (2006); *Armstrong Machine Co.*, 343 NLRB 1149, 1151 (2004).

Each of the four employees was sequestered before testifying. Each testified and corroborated that similar threats were made by Martinez. Their testimony over receiving the warnings by Martinez because of their participation in the strike was consistent and did not falter under cross-examination. The Board "has long held that such statements by an employer implicitly threaten discharge because they convey the impression that the employer considers complaining about working condi-

[6] Sergio Restituyo received a written warning on June 18 for his failure to call in advance of his absence on June 16, the night of the strike (Jt. Exh. 5). Restituyo did not testify at the hearing. However, Restituyo did participate in the strike as corroborated through testimony from his coworkers. As such, I find that Restituyo was also issued a warning by the Respondent based upon his no call/no show on the night of the strike.

tions and engaging in union activity incompatible with continued employment." *Equipment Trucking Co.*, 336 NLRB 277 (2001). The threats, moreover, made by Martinez, the overnight manager and a top official is a factor that the Board has long recognized as significant. "The threats were made by Respondent's general manager, a man who possessed the power not only to threaten but also to turn threat into reality." *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972).

As noted in *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003), the threats of future discipline, including discharge, for engaging in union activity is an independent violation of the Act: "These statements not only confirm the discrimination against Hemberger, but also amounts to threats and coercion, constituting independent violations of Section 8(a)(1) of the Act." Accordingly, I find that the threats regarding future discipline, including potentially discharge, made by Martinez, in the presence of a second supervisor, also violated Section 8 (a)(1) of the Act.

c. The Respondent violated Section 8(a)(1) of the Act by discharging Batista and Luna

The counsel for the General Counsel argues that Batista and Luna were discharged in violation of Section 8(a)(1) of the Act because they would not have been terminated under the Respondent's progressive discipline policy but for their final warnings received for participating in the strike. The Respondent argues that Batista was discharged because he was arriving late to work "almost every Monday" (Tr. 196) and Luna was discharged because he had falsified a document of completing an assignment to replenish the potable water in the aircraft's lavatory, which he did not actually do (R. Br. at 16, 17). The question remains under *Burnup*, above, whether the workers were guilty of the misconduct as charged.

The Respondent has a progressive disciplinary policy (Jt. Exh.10). This policy states

> Progressive discipline may range from a verbal warning, a written warning, or a discharge. Each level of discipline need not be imposed in every case, but is dependent on all the circumstances. Although not intended to cover every situation that may arise, the following are the general guidelines to be used in the progressive discipline process:
>
> 1. A Verbal Warning will be the first level of disciplinary action. Verbal warnings
> should be documented by the Supervisor/Manager - issuing the warning, and
> should be retained by that Supervisor or Manager.
> 2. A Written Warning will typically be the next action.
> 3. A Disciplinary Leave Notice is the third step of disciplinary action.
> 4. Termination is the final step in the progressive discipline program.

Colon stated that a final warning is defined as a performance infraction and another subsequent infraction can lead to termination or will lead to termination (Tr. 254).

Batista was discharged by ReadyJet on August 5 after receiving a final written warning for his no call/no show strike participation on June 16. Martinez informed Batista of his discharge and was told that he was no longer working for the Company. According to Batista, Martinez said the discharge was because of Batista "having been absent without call-in and for being involved in matters with the Union" (Tr. 86, 87). The employee termination notice did not state the reason for his discharge (Jt. Exh. 6).

Martinez said that Batista was terminated because he arrived late every Monday and then he had a no call/no show, "so we terminated him." Martinez testified that Batista told him that he was late on Mondays because of his scheduling conflict with school. Martinez promised to work with Batista in arranging his work and school schedule but Batista told him that he would keep his current schedule and do the best he could to arrive on time on Mondays. Martinez could not recall how many times that Batista had been late for work on Mondays from the summer of 2015 until his discharge on August 5 (Tr. 196, 197).

A review of Batista's absences subsequent to June 16 shows the following: On July 6, Batista called out. There is no documentation of the reason he called out and nothing to indicate that his absence was considered unexcused by the Respondent; On July 13, Batista called out and it was documented that he was sick as the reason for his absence. On July 20, Batista called out, but his excuse for his absence was not accepted. Finally, on August 3, Batista was a no call/no show. Batista was discharged on August 5 (R. Exh. 3).

Based upon this review, it is clear that absent the final warning issued to Batista because of his June 16 participation in the strike, he would not have been discharged. Without the June 18 final written warning for being no call/no show, Batista would have received his final warning for his August 3 no call/no show infraction. Under the Respondent's progressive discipline policy, Batista would not have been discharged because he would not have received a final warning until August 3 and not June 18. Inasmuch as the June 18 final warning was a violation of Section 8(a)(1), Batista's termination was also intertwined with his participation in the strike to invalidate his discharge. Batista's support of the Union through his participation in strike activity subjected him to termination upon his next infraction.[7]

With regard to Luna, he was discharged on July 27 (Jt. Exh. 7). The termination notice stated:

> Employee is being terminated because of his failure to follow company policies and job duties as Expected and trained. Employee has received 4 discipline notices in accordance with the company's Progressive discipline policy. Warnings consist of three instances whereby the employee did not fulfill his job duties as required by the company and the customer, one of which cost the company a fine of $90 by the airport. Another of the warnings caused a safety hazard to all employees. Additionally, The employee did not follow company policy by not calling management to inform them he would not be at work. The latest incident caused the company to receive a delay by the airport for failing to perform services that were

[7] Batista's absence on July 20 was not a violation of ReadyJet's no call/no show policy. Batista had in fact called in. His absence was not accepted, but he was not disciplined.

assigned to him. The employee falsified work time sheets which is also against company policy where (Falsification of Company Records).[8]

With regard to Luna, Martinez testified that he was terminated for falsification of records. According to Colon, Luna was responsible for ensuring there is sufficient water in the planes' lavatories and Luna was terminated because a pilot had called to complain that this service was not done, which delayed the departure of the plane. Martinez said that Luna had also received a warning for his no call/no show on the strike date, but did not recall if Luna ever had any attendance warnings prior to the strike date (Tr. 200). Colon said he was terminated due to performance issues. Colon complained that ReadyJet received a fine by Massport for not collecting trash, which was Luna's responsibility and that he also failed to empty the waste and replenish the water on a Delta plane's lavatory (Tr. 236–240). Colon testified he was terminated because of the latest incident in failing to replenish the plane's water in the lavatory. However, Colon could not recall when Luna had allegedly failed to replenish the plane's lavatory water supply. Colon testified that she believed Luna' dereliction of duty occurred either the night of or 2 days before the incident when the Respondent was fined $90 (Tr. 250).

Luna's termination notice cited three work-related infractions and one no call/no show policy violation. A review of Luna's disciplinary record shows that he received a prior written warning on March 17 for failing to remove airport terminal trash and the Respondent was fined $90 by Massport for littering (R. Exh. 2). Accepting Colon's testimony that the failure to replenish the water occurred 1 or 2 days before Respondent was fined $90 by Massport, it is clear there were no discipline given to Luna between March 17 and his June 18 final warning.[9]

Luna was issued a final written warning on June 18 for his June 16 participation in the strike when he was a no call/no show (R. Exh. 2). Unlike Batista and Mendez, there is no prior discipline noted for Luna's final warning. Consequently, I could reasonably conclude that Luna had only one prior discipline (March 17 warning), and perhaps one verbal counseling, before his June 18 written final warning. Subsequent to his final warning, the record shows no discipline except for his termination on July 24.

Like Batista, the dates of Luna's discipline is critical because if Luna had no subsequent discipline after his June 18 final warning, then the basis for his termination becomes faulty inasmuch as the final warning was issued on the basis of his protected activity for the June 16 strike. Luna's termination notice stated that "Additionally, the employee did not follow company policy by not calling management to inform them he would not be at work," which is a reference to his June 16 no call/no show. This statement is read in conjunction with the following sentence in the termination notice that stated "The latest incident caused the company to receive a delay by the airport for failing to perform services that were assigned to him." In my opinion, a reasonable reading of these two sentences means that Luna was terminated due to his failure to call in on June 16, which caused a delay in the performance of services. As such, Luna would not have been terminated but for his final warning for participating in the strike when he was a no call/no show.

Accordingly, I find and conclude that the Respondent discharged Batista and Luna due to their protected activity in violation of Section 8(a)(1) of the Act.[10]

4. The surveillance and interrogation of ReadyJet employees

a. The surveillance and interrogation of Evelyn González and Egla Cruz

Evelyn González (González)[11] testified that she previously worked for ReadyJet in Terminal C from December 2011 to May 2016 from 11 a.m. to 8 p.m. (Tr. 42). While on her lunch break at the Terminal C food court on January 7, 2014, González was asked to sign a union card by Lydia Kamanou, a union organizer (Tr. 54). González said she was approached by Kamanou while having lunch with coworker Egla Cruz (Cruz). Both were asked to sign union cards. All three sat at a table in the food court and their conversation lasted about 15 minutes. González noticed that they were being observed by two ReadyJet supervisors who were also at the food court approximately about one meter away (Tr. 56). She did not recall their names. She thought they saw her talking to Kamanou. González said she was unfamiliar with the concept of a union and had never spoken to a union representative before this time. She said she signed and dated the union card on January 7, 2014 (Tr. 43–54; GC Exh. 2).

After the union cards were completed and signed, González and Cruz went down to the lower level to the company break

[8] There were some inconsistencies in Luna's testimony as to whether or not he was informed as to the reasons for his termination in his native language due to his limited English ability. It is not necessary to decide this issue since it is sufficient that Luna did eventually find out the reasons for his discharge.

[9] It is not clear when the alleged falsification ". . . of work time sheets" occurred, but I would reasonably conclude that this alleged infraction occurred prior to the June 18 final written warning because there was no discipline issued for this infraction by ReadyJet under its progressive discipline policy.

[10] Assuming, arguendo, that the mixed motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983) applies under the circumstances of this complaint, I find that the General Counsel had met his initial burden and that the Respondent failed to meet its burden to show it would have taken the same action even absent the employee's protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate that it would have taken the same action in the absence of the protected conduct. In finding that the employer's proffered reasons are pretextual, the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons, absent the protected activity. See *Alternative Energy Applications*, 361 NLRB No. 139, slip op. at 3 (2014), citing authorities. It has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[11] González testified by video. There was no opposition to her video testimony.

room and were met by supervisor Rafael Felipe (Felipe) and he called them to his office. González and Cruz were told that they were seen with the Union and he said "don't pay attention to them" and "stay away from them because they were not good for us or for the company." According to González, Felipe discussed his own work experience at Aramark as an example as to what happened after Aramark lost its cleaning service contract and the union members subsequently lost their jobs. González said that Cruz responded by saying it was their right to know about the Union while on their break time. González did not say anything. They then left his office (Tr. 49–51, 56).

Cruz testified that she has been working as a cleaner with ReadyJet since November 2012 at Terminal C from 6 a.m. to 4 p.m. Cruz confirmed that she was asked to sign a union card by Kamanou in January 2014 at the food court. Cruz said she was with González eating at the table when approached by Kamanou. Cruz said Kamanou introduced herself and asked if they wanted to be part of the Union. Since neither knew anything about the Union, Cruz testified that Kamanou proceeded to explain the benefits of a union and asked them to sign union cards (Tr. 64–66; GC Exh. 3).

Cruz said they finished their break and were walking towards the break room when approached by Felipe and instructed to go to his office. Cruz said that Felipe asked "what were they doing upstairs, what they were up to, and if had spoken to anyone from the Union." According to Cruz, Felipe said that the Union was "no good" that the Union "will take their money for themselves" and that they should "run away" from them (union representatives) if they see them again. Cruz said she responded to Felipe by saying that it was their right to listen and that they don't have to run away from them. Cruz said their conversation ended and Felipe warned them "Don't do it again. Don't stop and talk to those people again" (Tr. 68, 69).

Cruz admitted that she did not observe any ReadyJet supervisors at the food court. Cruz also admitted that neither Felipe nor any Respondent management official had threatened her or González with losing their jobs if they support the Union (Tr. 71–73).

González testified that 2 months later, she was spoken to by Luis Oliva (Oliva), a ReadyJet supervisor at the break room. Oliva asked González and Cruz whether they had signed union cards. Cruz responded that it was their right and they were not going to confirm or deny signing the cards. Oliva then left (Tr. 51–53).

b. The interrogation of Rafael Marty

Rafael Marty (Marty) testified that he started at ReadyJet in January 2014 until July 2014 cleaning airplanes in Terminal A. He testified that ReadyJet Supervisor Geraldo Almonte (Almonte) gave him rides to work on the weekends in his car during the months of February or March because they lived in the same general neighborhood (Tr. 140–142). He said that Almonte would always drive him to work and sometimes back home depending on Almont's departure schedule. He said the commute was usually a 30-minute car ride (Tr. 144–145).

Marty testified that his initial work shift was at 9 p.m. until the following morning and then he switched his schedule to 2 until 9 p.m. (Tr. 145, 146). Marty was certain that Almonte worked the weekend shifts (Tr. 146) when Marty began working his 2 p.m. shift in February and part of March (Tr. 146–147).

Marty testified that Almonte would talk about the Union in the car during their ride and how Almonte would tell him that the Union was no good for thCcompany. Marty said this same conversation occurred "over and over again" during their Saturday and Sunday rides to work. Marty maintained that Almonte would repeatedly asked Marty who else supported the Union. Marty would respond that he did not know. Marty said he never responded to Almonte's criticisms of the Union (Tr. 142–144).

Respondent's Rebuttal to the Surveillance and Interrogation

Rafael Felipe (Felipe) is and has been a supervisor for the past 4 years with ReadyJet. He started in 2011 as a group lead. His work shift starts at 7 a.m. and finishes around 3:30 p.m. and he had the same shift for the past 3-1/2 years at Terminal C. Felipe is responsible for ensuring that employees have the proper equipment to do their job. (Tr. 218, 219).

Felipe testified that he knows Cruz and González and recalled interacting with them after supervisor Oliva observed them being approached by the Union in the food court in January 2014 (Tr. 219). Felipe approached them while they were coming out of the bathroom and started a conversation with them together with supervisor Oliva in the office. Felipe said the subject of the Union came up because they were asking the supervisor about the Union, how it functions, its purpose and objectives. Felipe discussed the concept of a union with them and gave them his opinion that the Union was "so-so" but inferred that they could reach their own conclusions about the Union because "they are grownups" (Tr. 220–225).

Felipe admitted to discussing his own experience with the Union as the basis for his "so-so" comment when he worked for Aramark and the Union promised much and then everyone lost their jobs after Aramark lost the cleaning contract. Felipe denied saying that the Union was no good; denied telling them not to talk to the Union; and denied telling them not to sign union cards (Tr. 224, 225).

Geraldo Almonte (Almonte) testified that he previously worked for ReadyJet from 2011 to November 2014 (Tr. 188). Almonte said he was a manager assistant with the Respondent and worked the overnight shift from 10 p.m. until nighttime operations were completed around 7 or 8 a.m. from Monday through Friday (Tr. 184–186).

Almonte said he knows Rafael Marty as a worker with ReadyJet and as a neighbor in the same general area. Almonte denied talking to Marty about the Union at any time (Tr. 187). Almonte also denied ever working on weekends and stated that his hours and shift have always been the same during his employment with ReadyJet (Tr. 189, 190).

Discussion and Analysis

The counsel for the General Counsel argues that Respondent violated Section 8(a)(1) of the Act by (a) in about January or February of 2014 interrogating employees about their union sympathies and union activities, threatening employees with loss of employment if they engaged in union activity, and creat-

ing the impression that employees' union activities were being watched by Respondent; (b) in about February or March of 2014, interrogating employees about their union activities; and (c) on various occasions between January and July 2014, interrogating employees about the union activities of other employees.[812]

a. The Respondent violated Section 8(a)(1) of the Act when it interrogated and threatened Evelyn González and Egla Cruz with loss of employment due to their union involvement

The counsel for the General Counsel alleges that González and Cruz were subjected to questions and comments about the Union on January 7, 2014 by Rafael Felipe, who was a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act at the time. The General Counsel also argues that manager Luis Oliva questioned González and Cruz about their union activity in February or March 2014. The Respondent denied that González and Cruz were interrogated about their union activity.

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

> Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002); also, *Intertape Polymer Corp.*, 360 NLRB 114 (2014).

Statements made by an employer to employees may convey general and specific views about unions or unionism or other protected activity as long as the communication does not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Statements are viewed objectively and in context from the standpoint of employees over whom the employer has a measure of economic power. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011). When an employer tells employees that they will jeopardize their jobs, wages, or other working conditions by supporting a union or engaging in concerted activities, such communication tends to restrain and coerce employees if they continue to support a union or engage in other concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC*, 331 NLRB 188 (2000); *Bloomfield Health Care Cent*er, 352 NLRB 252 (2008).

In applying the totality of the circumstances test, and considering the context, I find the allegation of interrogating González and Cruz about their union sympathies as coercive and that they violated Section 8(a)(1) of the Act. See *Assn. of Community Organizations For Reform Now*, 338 NLRB 866 (2003).

González and Cruz were called into Felipe's office after the employees were observed by a supervisor talking to a known union organizer in the food court. González and Cruz did not ask to speak with Felipe. They were either instructed or asked into Felipe's office. The timing and place of the interrogation is suspect since it comes immediately after the workers met with a union organizer. The Respondent's explanation that González and Cruz were called into Felipe's office because they wanted to know about the Union lacks any merit. Felipe testified he was informed that González and Cruz were approached by the Union. Felipe identified Oliva as the individual who had informed him of this fact. Felipe testified that he initiated the conversation in his office regarding the Union with González and Cruz. Supervisor Oliva was also present at this discussion (Tr. 220–222). Felipe denied criticizing the Union or telling González and Cruz to stay away from the Union. Felipe did express his own negative experience with the Union and told the employees that they were adults and could make up their own minds about the Union.

I credit the testimony of González and Cruz that they did not seek out Felipe to find out about the Union; rather, they were observed by Oliva talking to Kamanou and were directed to Felipe's office. I also credit their testimony that both were warned to stay away from the Union and that the Union would not be beneficial to them. Felipe denied making these statements. Oliva, who could have corroborated the denials, was not called as a witness for the Respondent. Even assuming that I accept Felipe's denials that he did not criticize the Union in front of González and Cruz, I find that Felipe's anecdotal story about his own negative experience with the Union was intended and is the equivalent of discouraging employees from supporting the Union. By telling González and Cruz that their jobs may be jeopardized based upon Felipe's own experience when he was working at a company that subsequently laid off or discharged union employees, such communication tends to restrain and coerce employees for their continued union support or for their concerted activities in violation of Section 8(a)(1). *Noah's Bay Area Bagels, LLC*, above.

I find that the inquiry from Felipe was designed to gain information about their union sympathies, violates Section 8(a)(1). Particularly, coming on the heels of being observed by a supervisor of González and Cruz with Kamanou, followed by the employees being directed to attend a meeting in Felipe's office, in which Felipe made it clear through his own work experience of his opposition to unionization, the entire conversation regarding the Union was coercive.

Similarly, I find that the inquiries made by supervisor Oliva 2 months later on company premises as to whether González and Cruz had signed union cards, Cruz replied that it was their right to do so and they did not have to answer his questions,

[12] Testimony was provided by the General Counsel that Supervisors Torres and Martinez were present and observed the picketing activities of the employees on the night of the strike. To the extent that this is an allegation not in the complaint, I find that mere observation of open activity from a workplace site does not rise to the level of surveillance. *F. W. Woolworth*, 310 NLRB 1197 (1993) (employer's mere observation of 20 employees' open, public union activity on its premises does not violate the Act).

were coercive and restrain their Section 7 rights. Employees have a right to support for or against union representation without their views being made known to management.

As noted above, Supervisor Oliva did not testify. The counsel for the General Counsel argues that the failure of the Respondent to call Oliva as a witness supports an adverse inference against the Respondent. However, an adverse inference need not be drawn inasmuch as the Respondent simply failed to credibly rebut the testimony of Cruz and González that they were subjected to interrogating inquiries by Oliva as to whether they had signed union cards.

I also find that the Respondent violated Section 8(a)(1) of the Act by threatening González and Cruz with loss of employment due to their Union activity. Here, it is not disputed that Felipe told them about his own work experience at Aramark and how employees lost their jobs after the Union was voted in. The telling of his story obviously gave the impression to González and Cruz that potentially, they could also lose their jobs for supporting the Union.

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, above.

Here, the Respondent violated Section 8(a)(1) when it communicated to employees that they will jeopardize their job security, wages or other working conditions if they support the Union. *Metro One Loss Prevention Services Group*, supra, 356 NLRB 89, 89–90 (2010) (employer statement that employees should be grateful for their years of service and pay rates and warning that it could get much worse if a union came in constituted unlawful threat). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). See, e.g., *SDK Jonesville Division, LP*, 340 NLRB 101, 101–102 (2003) (unspecified threat that it was not in employee's best interest to be involved with the union found violative, citing *Keller Ford*, 336 NLRB 722 (2001), enfd. 69 Fed.Appx. 672 (6th Cir. 2003) (a supervisor unlawfully advised an employee not to talk to other employees about insurance copayments, because it could be "hazardous to [his] health);" *Long Island College Hospital*, 327 NLRB 944, 945 (1999) (a supervisor unlawfully told employees to proceed with caution in taking a work-related issue to the union because one of the employees was getting an unfavorable reputation with management).

Accordingly, I find and conclude that Respondent violated Section 8(a)(1) of the Act when it interrogated González and Cruz about their union activity on about January 7, 2014, threatened them about loss of employment for supporting the Union and 2 months later when Supervisor Oliva questioned them about signing union cards.

b. The Respondent violated Section 8(a)(1) of the Act by creating an impression that the union activity of Evelyn González and Egla Cruz was under surveillance

The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(1) by giving the impression that the union activities of González and Cruz on January 7, 2014, in the Terminal A food court was under surveillance in order to interfere with their ability to meet and talk with union organizer Kamanou. The Respondent denies creating the impression that their concerted activity was under surveillance.

Under Board precedent, "management officials may observe public union activity, particularly without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982) (Table); see also *Durham School Services*, 361 NLRB No. 44, slip op. at 1 (2014) (observation of union activities in a public area was unlawful surveillance when manager "was observing employees in way that was out of the ordinary"). Such "out of the ordinary" surveillance of union activity in public places includes an employer's "unreasonably close" observation of organizers as they finish their lunches. *Montgomery Ward & Co.,*692 F.2d 1115, 1128 (7th Cir.1982), enfd. 256 NLRB 800 (1981).

González testified that she, along with Cruz, sat at the food court in Terminal A and were talking with union organizer Kamanou. All three sat at a table in the food court while talking and their conversation lasted about 15 minutes. González testified that they were being observed by two ReadyJet supervisors who were also at the food court approximately about one meter away. She did not recall their names (Tr. 56). Cruz did not recall seeing any supervisors at the food court.

Supervisor Felipe testified that Oliva observed González and Cruz talking to Kamanou. Immediately following the food court observation by at least two ReadyJet supervisors, just after their lunchbreak, González and Cruz were directed by Oliva into Felipe's office. At that meeting, Felipe and Oliva already knew that González and Cruz spoke to Kamanou and Felipe had to have inquired about their union activity with Kamanou because he then told them about his own experience with the Union.

Under such circumstances, it is reasonable to conclude that González and Cruz would assume that their union activities were under surveillance by Respondent. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009) (questioning employees about attendance at union meetings constitutes unlawful interrogation as well as creating impression of surveillance); *United Charter Service*, 306 NLRB 150, 151 (1992) (operations manager created the impression that employees' union activities were under surveillance by informing them that he knew about the employees' union meeting). In addition, I credit González' testimony that two ReadyJet supervisors were approximately one meter away from their discussions with Kamanou. Although Cruz could not recall seeing a supervisor, it is not disputed that both were seen by Oliva with the union organizer. A union organizer's conversations with the two employees—only a few feet away—significantly heightened the coercive effect of that observation. See *Flexsteel Industries*, 311 NLRB 257 (1993) (employees should be free to participate

in union activities without fear that members of management are "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways") and *Montgomery Ward &Co.*, above; *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 23 (2016).

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act when its supervisors interrogated its employees about their union activities and gave the impression that the employees' union activities were under surveillance.

c. The Respondent did not violate Section 8(a)(1) of the Act when Rafael Marty was allegedly interrogated about union activities on various occasions Between January and July 2014

The counsel for the General Counsel also maintains that Geraldo Almonte subjected Rafael Marty to inappropriate union-related inquiries while they were commuting to and from work in violation of Section 8(a)(1) of the Act.

The Respondent argues that Marty's charge that he was interrogated in a car driven by Supervisor Geraldo Almonte from February until the end of March 2014 was untimely.[13]

Under Section 10(b) of the Act, a charge must be both filed and served within 6 months of the alleged unfair labor practice. Section 10(b) provides that ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.'' (Emphasis added.) Since the addition of the 10(b) proviso language by Congress in the 1947 Taft-Hartley amendments, the Board has consistently held that, absent the existence of a properly served charge, a respondent will not be liable for conduct occurring more than 6 months earlier. *Old Colony Box Co*., 81 NLRB 1025, 1027 (1949); *Erving Paper Mills*, 82 NLRB 434, 435 (1949); *Cathay Lumber Co*., 86 NLRB 157, 162–163 (1949), enfd. 185 F.2d 1021 (2d. Cir. 1951), vacated on other grounds 189 F.2d 428 (5th Cir. 1951); *Luzerne Hide & Tallow Co.*, 89 NLRB 989, 1004 (1950); *Koppers Co.*, 163 NLRB 517 (1967); and *Ducane Heating Corp*., 273 NLRB 1389, 1391 (1985).

Marty's charge was filed on November 13, 2014 (Case 01–CA–140878) (GC Exh. 1e and 1f). Six months prior to the date of the charge is May 13, 2014. *Dun & Bradstreet Software Services*, 317 NLRB 84, 84–85 (1995).

I am in agreement with the Respondent that the portion in the complaint regarding Rafael Marty's charge should be dismissed. Marty testified that his rides with Almonte to work on weekends began in February and ended in April 2014, when Marty purchased a vehicle for his own commute. Marty never testified that he had any union-related conversations with Almonte, or any other Respondent supervisors or agents after April 2014.

Alternatively, the Respondent argues that the conversations in the car never occurred between Marty and Almonte. Marty testified that supervisor Almonte gave him rides to work on the weekends in his car during the month of February and/or March. He said that during these rides, Almonte would tell him that the Union was no good for the company. Marty said this same conversation occurred "over and over again" during their Saturday and Sunday commute to work. Almonte would also allegedly ask Marty to identify which workers were supporting the Union.

Almonte was an assistant manager at the time and the parties stipulated that he was a supervisor within the meaning of Section 2(11) of the Act. Almonte testified that he knows Marty but denied talking to Marty about the Union at any time (Tr. 187). Almonte testified that he never worked on weekends and that his hours and shift have always been the same during his employment with ReadyJet.

Based upon the totality of the testimony provided by these two individuals, I find that Almonte credibly testified that he never provided rides to work to Marty on weekends when interrogation about the Union allegedly occurred. I find that Marty and Almonte never had any union-related conversations at any time because their work shifts never coincided in order to have shared rides together.

Marty testified that he started working at ReadyJet as a cleaner on the overnight shift, from 9 p.m. until the morning and then was accommodated with a different shift in late January through March 2014 from 2 until 9 p.m. Marty testified that he was interrogated in Almonte's car during their weekend rides to work in February and March 2014 (Tr. 142). Almonte, on the other hand, in his last year (2014) with ReadyJet, worked the overnight shift from 10 p.m. until 7 or 8 a.m. and then his shift changed to the morning (Tr. 186). He also testified without dispute that he never worked on weekends or could not recall working on weekends (Tr. 190):

> Q. And did you ever work during the weekend hour—on weekend days?
>
> A. No.
>
> Q. Not once did you work during any Saturday or Sunday, during your employment for ReadyJet?
>
> Not that I remember.

Contrary to the General Counsel's assertions (GC Br. at 16, 17), Almonte was clear and decisive in his testimony that he never worked on weekends. When pressed by the General Counsel, Almonte said, "not that I remember" to working on weekends, but that answer must be considered in light of his earlier response, which was "no." In weighing the credibility of Almonte's testimony with the testimony of Marty, it is my opinion that Almonte would have truthfully recalled working every weekend in February and March 2014 (in order to have driven Marty). The fact is that Almonte did not hedge his response when he responded, "no" to the question if he had ever worked on weekends. In my opinion, Almonte stated, "not that I remember" only because there could have been an outside possibility that he might have worked on a particular weekend. Moreover, the General Counsel never asked Almonte whether he ever gave work-related rides to Marty. The General Counsel argues that Almonte "neither admitted nor denied giving rides to Marty" (GC Br. at 16). However this critical question was never asked by the General Counsel, which would have resolved a significant credibility question. Consequently, the

[13] Marty's testimony establishes that the inquiries stopped at the latest in early April 2014 when Marty purchased his own vehicle in order to commute to work (Tr. 144).

failure of the General Counsel to ask this question and the fact that the work shifts of Marty and Almonte never coincide leads me to conclude that the rides and the union-related interrogations never occurred.

I credit Almonte's testimony that he never worked on weekends or could not remember working on weekends over Marty's testimony that he was offered rides every weekend in February and March 2014. However, even assuming that Almonte drove Marty to work on some weekends during these 2 months, I do not find that Marty was subjected to constant interrogations about his union activity and support or questioned about the union activities of other workers. Questioning an employee about protected activity is not a per se violation of the Act but is evaluated considering the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and whether the employee is an open and active union supporter. *Intertape*, above.

Marty testified that they would discuss other matters, like work, ". . . other things from work, friends or families of stuff we did or didn't do, you know, just personal stuff" (Tr. 145). According to Marty, Almonte never threatened Marty for his support of the Union; Almonte never instructed or warned Marty to stay away from the Union; and Almonte never promised Marty any benefits if he did not support the Union. It behooves one to ask the question that if Marty felt intimidated by the alleged interrogations about his union activities, why Marty didn't report these interrogations to the Union, especially at a time that the Union was actively organizing the Respondent's employees. Indeed, if Marty felt threatened or uncomfortable with the alleged discussions on his union support, why did Marty continue to accept rides from Almonte every weekend in February and March 2014?

Based upon my review under all the circumstances, the alleged interrogation of Marty did not reasonably restrain, coerce or interfere with rights guaranteed by the Act. *Bloomfield Health Care Center*, above. The logical conclusion is that Marty never rode with Almonte to work on weekends or that if Almonte had in fact discussed union matters with Marty on those rides, those discussions did not raise to the level of restrain or coercion of Marty's Section 7 rights.

Accordingly, based on the above, I conclude that the General Counsel has failed to meet his burden of proof as to the allegation in the complaint regarding the interrogation of Rafael Marty by Geraldo Almonte while commuting to work, and therefore I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, ReadyJet, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 32 BJ SEIU New England 615, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act on about June 18, 2015, by discriminatorily issuing written final warnings to Claudio Batista, Francisco Luna, and Gerfi Mendez; and written warning to Julio Medina and Sergio Restituyo.

4. The Respondent violated Section 8(a)(1) of the Act by discriminatorily terminating Claudio Batista on about August 5, 2015 and Francisco Luna on about July 24, 2015.

5. The Respondent violated Section 8(a)(1) of the Act by telling Claudio Batista, Francisco Luna, Gerfi Mendez, and Julio Medina that their discipline was for their participation in the strike and threatening them with further discipline for their activity in support of the Union.

6. The Respondent violated Section 8(a)(1) of the Act by interrogating Evelyn González and Egla Cruz about their union activity and support for the Union.

7. The Respondent violated Section 8(a)(1) of the Act by threatening Evelyn González and Egla Cruz with loss of employment for their support of the Union.

8. The Respondent violated Section 8(a)(1) of the Act by creating an impression that the protected activity of Evelyn González and Egla Cruz was under surveillance.

9. The Respondent did not otherwise violate Section 8(a)(1) of the Act when Rafael Marty allegedly repeatedly interrogated regarding his support and the support of other workers for the Union by Geraldo Almonte.

10. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued terminations to Claudio Batista and Francisco Luna, I shall order the Respondent to offer Batista and Luna full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), my recommended Order requires Respondent to compensate Claudio Batista and Francisco Luna for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 1 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey,* 363 NLRB No. 143 (2016).

In addition to the remedies ordered, I shall recommend that the Respondent compensate Claudio Batista and Francisco Luna for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc*., 364 NLRB No. 93 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

My recommended Order requires the Respondent to expunge from its files any and all references to the unlawful termination of Claudio Batista and Francisco Luna, including the "Employee Termination Form" dated August 5, 2015, issued to Batista and the "Employee Termination Form" dated July 24, 2015 issued to Luna and to notify them in writing in English and Spanish that this has been done and that the unlawful discharge will not be used against them in any way.

My recommended order also requires that the Respondent remove all references to the "Final Written Warning" dated June 18, 2015 issued to Claudio Batista, Francisco Luna and Gerfi Mendez, including said, "Final Written Warning," from their files and notify them in writing in English and Spanish that it has done so and that the final warnings will not be used against them in any way.

It is further recommended that Respondent remove all references to the "Written Warning" dated June 18, 2015 issued to Julio Medina and Sergio Restituyo, including said "Written Warning," from their files and notify them in writing in English and Spanish that it has done so and that the written warnings will not be used against them in any way.

The General Counsel also requests that I order a responsible management official read the notice to the assembled employees or to have a Board agent read the notice in the presence of a responsible management official (GC Br. at 40). I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6–7 (2014); *Excel Case Ready*, 334 NLRB 4, 4–5, (2001). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. I agree with the General Counsel that Respondent, as described above, engaged in numerous violations of Section 8(a)(1) of the Act. In addition, the Respondent discharged Batista and Luna, supporters of the Union, in violation of Section 8(a)(1) of the Act. The Board has held that the unlawful discharges of union supporters are highly coercive. *Excel Case Ready*, supra at 5.

I find that a public reading of the remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. Accordingly, I will require the attached notice to be read publicly by the Respondent's representative or by a Board agent in English and Spanish, in the presence of the Respondent's supervisors and agents, to include Sarah Colon, Rafael Felipe, Luis Oliva, Giovannie Martinez, Jensy Diaz and Jean Carlos Torres.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[14]

[14] If no exceptions are filed as provided by Sec. 102.46 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, ReadyJet, Inc., Boston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees because of their support for the 32 BJ SEIU New England 615, or any other Union.

(b) Coercively interrogating employees about their union sympathies.

(c) Creating the impression that employees' union and other protected concerted activities are under surveillance.

(d) Threatening employees with loss of employment and benefits in order to dissuade employees from supporting the 32 BJ SEIU New England 615 or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Claudio Batista and Francisco Luna whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful suspension and discharge, as set forth in the remedy section of this decision.

(b) Compensate Batista and Luna for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 1 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Immediately offer full reinstatement to Claudio Batista and Francisco Luna and if the offers are accepted, reinstate Batista and Luna to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Batista and Luna, including the "Employee Termination Form" dated August 5, 2015, to Batista and the "Employee Termination Form" dated July 24, 2015, to Luna and within 3 days thereafter notify them in writing in English and Spanish that this has been done and that the discipline will not be used against them in any way.

(e) Remove all references to the "Final Written Warning" dated June 18, 2015, issued to Claudio Batista, Francisco Luna, and Gerfi Mendez, including said "Final Written Warning," from their files and notify them in writing in English and Spanish that it has done so and that the final warnings will not be used against them in any way.

(f) Remove all references to the "Written Warning" dated June 18, 2015 issued to Julio Medina and Sergio Restituyo, including said, "Written Warning," from their files and notify them in writing in English and Spanish that it has done so and that the final warnings will not be used against them in any way.

(g) In any like or related manner interfering with, restraining,

or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its existing properties in the greater Boston, Massachusetts area, and particularly at Logan Airport Terminals A and C, copies of the attached notice marked "Appendix"[15] in the English and Spanish languages. Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2014.

(j) Mail a copy of said notice in the English and Spanish languages to Evelyn González and Sergio Restituyo at their last known addresses.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 12, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, discipline, or otherwise discriminate against any of you for engaging in union or other protected activity, including announcing your support and participating in a strike for the 32 BJ SEIU New England 615 or any other union.

WE WILL NOT interrogate you about your support or lack thereof for the 32 BJ SEIU New England 615 or any other union.

WE WILL NOT create the impression that your union and other protected concerted activities are under surveillance.

WE WILL NOT threaten your loss of employment or benefits in order to discourage you from supporting the 32 BJ SEIU New England 615 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Claudio Batista and Francisco Luna full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Claudio Batista and Francisco Luna whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of their respective discharge dates to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate Claudio Batista and Francisco Luna for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Claudio Batista and Francisco Luna, including their respective Employee Termination Forms.

WE WILL, within 3 days thereafter, notify Claudio Batista and Francisco Luna in writing that this has been done and that their discharge will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove all references to the unlawful Final Written Warnings dated June 18, 2015 issued to Claudio Batista, Francisco Luna and Gerfi Mendez, including the Final Written Warnings from their files.

WE WILL, within 3 days thereafter, notify Claudio Batista, Francisco Luna and Gerfi Mendez in writing in the English and Spanish languages that this has been done and that their disci-

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pline will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove all references to the unlawful Written Warnings dated June 18, 2015 issued to Julio Medina and Sergio Restituyo, including the Written Warnings from their files.

WE WILL, within 3 days thereafter, notify Julio Medina and Sergio Restituyo in writing in the English and Spanish languages that this has been done and that their discipline will not be used against them in any way.

READYJET INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01–CA–132326 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.